No. 83-859

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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CALIFORNIA,

Petitioner,

-vs-

CHARLES R. CARNEY,

Respondent.

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

# TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

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Respondent Charles R. Carney respectfully prays that the petition for writ of certiorari filed by the State of California be denied.

## JURISDICTION

The decision of the California Supreme Court in this case, acknowledging reasonable privacy interests in the living quarters of an immobilized motor home in police custody,

rests on adequate and independent state grounds "plainly stated" in the opinion. Michigan v. Long, ___ U.S. ___, 103 S.Ct. 3469 (1983). Therefore, this is not a case "arising under" the federal constitution (Article III, section 2) subject to review by this Court pursuant to 28 U.S.C. section 1257(3).

The initial citation of legal authority in the body of the California Supreme Court opinion is Justice Mosk's invocation of Article I, section 13 of the California Constitution which, it is noted, "establishes the right of the people of this state to be secure...from unreasonable searches and seizures." The Court incidently notes "The Fourth Amendment provides a similar guarantee." (Petitioner's Appendix, page A-6.)

While the opinion traces the genesis and evolution of the "automobile exception" to the warrant requirement from Carroll v. United States, 267 U.S. 132 (1925), the

decision explicitly states "California courts have independently relied on similar reasoning" as the federal authorities. (Petitioner's Appendix, page A-11.) The court expressly recognizes the independent basis for California rules regarding searches of vehicles. Instead of casually citing the state constitution and relying "exclusively" on federal cases, Michigan v. Long, supra, the decision here relies extensively on state cases based wholly or in part on the California Constitution and the independent state exclusionary rule of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955), established before the decision in Mapp v. Ohio, 367 U.S. 643 (1961).1/

Furthermore, a decision adverse to respondent here will not determine the outcome of

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1/ California Constitution, Article I, section 28(d), enacted in June, 1982 and purporting to eliminate the state exclusionary rule, does not apply to this case which arose prior to the constitutional amendment. People v. Smith, 34 Cal.3d 251, 667 P.2d 149 (1983).

this case since the California Supreme Court remains the final arbiter whether or not to follow this Court's advice on remand. The Court's obligation to avoid rendering opinions only advisory of federal rights, but not determinative of a case or controversy, warrants denial of the petition. Federal interference with this state court decision is not appropriate.

## CONSTITUTIONAL PROVISIONS INVOLVED

Respondent has never claimed rights protected by the Fifth Amendment are implicated in this case as suggested in the petition, page 3.

## STATEMENT OF THE CASE

Respondent Carney was charged in the California Superior Court of San Diego County with a single count of possessing marijuana for sale. Mr. Carney's motion to suppress evidence, claiming the warrantless entry and search of the living compartment of his parked motor home violated California Constitution, Article I, section 13 (as well as the

federal constitution), was denied. Respondent entered a nolo contendere plea to the charge, he was fined $500.00 and placed on probation for a three year period which expired more than a year ago on January 8, 1983.

Six justices of the California Supreme Court, over a single dissent, reversed the order of probation, finding the warrantless entry and search violated the California Constitution and complementary federal law.

The motion to suppress evidence was litigated on facts presented at a preliminary hearing. The rendition of the facts in the petition is not entirely accurate.

Respondent Carney was observed by Police Officer Williams talking to a person, unidentified in the record, who appeared to be a teenager, the "Mexican boy" referred to by Petitioner. The record fails to disclose this person's age. The "boy" did not testify at the hearing. Later, Williams saw Mr. Carney and the young man walk to a nearby

parking lot and enter a parked Dodge motor home. Neither the nature of the parking lot nor the physical configuration of the motor home are described in the record.

Williams noticed the license plate on the motor home and claimed to recall anonymous information of marijuana exchanged for sex with juveniles by an unidentified male associated with the motor home. The extent of Williams' anonymous information is unclear from the record.

Other police agents including Officer Clem arrived later and watched the motor home with Williams for approximately an hour and a half. When the young man exited the motor home and began walking away, he was stopped and questioned. The record is not clear what questions were asked of the young man and what answers he gave. It is not clear who was present during the questioning and who heard what was said. The young man apparently told Williams the

occupant of the motor home had given him a small bag of marijuana and performed oral copulation on him.

At the officers' request, the young man returned to the motor home, knocked on the door and asked Mr. Carney to step outside. Respondent stepped outside and Officer Clem then entered the living compartment of the motor home allegedly looking for "additional suspects." Once he had entered, Clem observed marijuana and "paraphernalia" on a table inside. Mr. Carney was arrested after Clem's entry to look for more suspects.

The motor home was seized and the entire living compartment was thoroughly searched, including the cupboards, drawers and the refrigerator where additional marijuana was found.

## ARGUMENT

### THIS CASE IS UNWORTHY OF REVIEW BY THIS COURT

There is no important or compelling reason for review of this unusual case. Obviously no grave error needs correction since Mr. Carney has already successfully satisfied his grant of probation.

This case is unsuited to establish national precedent for several reasons.

The record inadequately sets forth details necessary for refined review by this Court. The physical configuration of the motor home which was the subject of the search is only vaguely described. The record fails to indicate whether the driving compartment was accessible from the living compartment, it incompletely describes the fixtures of the particular motor home, and there is a troubling failure to establish completely the predicate facts leading up to the warrantless entry. Whether the motor home served as respondent's primary residence,

whether the vehicle was parked permanently or only temporarily in the parking lot, whether the parking lot catered to long or short term users, all these questions are unanswered in the record.

In the face of an uncertain record, review should be denied.

Furthermore, the courts are not in disarray with conflicting decisions on the unique question raised in this case. The Ninth Circuit in United States v. Williams, 630 F.2d 1322, 1326 (9th Cir. 1980) and United States v. Wiga, 662 F.2d 1325 (9th Cir. 1981), like the California Supreme Court, has recognized a motor home is mobile, but also recognized a motor home is a dwelling area, a space traditionally entitled to the highest degree of protection from warrantless intrusion. Payton v. New York, 445 U.S. 573 (1980). No case has been cited by Petitioner or found by Respondent which actually considered the privacy interests in a motor home and decided the issue

in conflict with the decisions of the California Supreme Court and the Ninth Circuit.

The "conflicts" cited at page 25 of the petition are illusory. One of the cases listed, United States v. Cadena, 588 F.2d 100 (5th Cir. 1979), explicitly acknowledged the "increased measure of privacy that may be expected" in living quarters on a vessel requires "careful scrutiny" of "the exigency of the circumstances excusing the failure to secure a warrant." The requirement for genuine exigency to excuse the failure to obtain a warrant set forth in Cadena is the same analysis applied in Williams, Wiga and by the California Supreme Court in this case with respect to the living compartment of a motor home.

These cases are consistent with existing law.

This Court has frequently cited a dual rationale for the automobile exception, based in part on inherent mobility of a

vehicle, but also based on the "diminished expectation of privacy" associated with an automobile. United States v. Chadwick, 433 U.S. 1, 12 (1977). In South Dakota v. Opperman, 428 U.S. 364, 367 (1976) the Court observed that "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."

Petitioner inaccurately asserts "inherent mobility" is the only justification for the automobile exception. This contention ignores the line of cases approving warrantless searches of disabled cars or cars in police custody "in which the possibility of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent." Cady v. Dombrowski, 413 U.S. 433, 441-442 (1973). As explained in United States v. Chadwick, supra, "The answer lies in the diminished expectation of

privacy which surrounds the automobile."

In disregarding any expectations of privacy in the living compartment of a motor home, Petitioner suggests not a "vehicle exception" to the warrant requirement, but an "inherent mobility" exception. Many items may be characterized as "inherently mobile" such as suitcases, letters, even people. Yet one could scarcely expect the Court to authorize warrantless searches of any item merely because it is potentially mobile.

Unlike the search of an ordinary automobile which "seldom serves as one's residence or as the repository of personal effects," Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion) and where expectations of privacy are "diminished by the obviously public nature of automobile travel," South Dakota v. Opperman, supra, warrantless entry and search of the living compartment of a legally parked, driverless motor home under police control stretches

the reason for an automobile exception too far. Lower courts have correctly determined the privacy interest in a dwelling space requires greater exigency to justify warrantless entry than the mere speculated "possible" emergency represented by "inherent mobility." 2/

Real rather than theoretical justification must exist for warrantless intrusion into a dwelling space.

Even assuming an "automobile exception" could be applied to the warrantless search of a motor home, probable cause to search is required. Here the requisite probable cause is not established in the record. Officer

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2/ As the California Supreme Court noted, no claim of genuine exigency can be made on the record in this case. Respondent had been arrested outside the motor home which was parked for an unknown period of time in a privately owned parking lot on a weekday afternoon within a few hundred yards of a courthouse where many magistrates were available to issue the requisite warrant. Under these circumstances, securing the motor home while a warrant was obtained would be no more difficult than securing any other residence in order to obtain a magistrate's permission to search.

Clem who made the physical entry into the living compartment never claimed he entered believing he would find contraband and never claimed in the record he had probable cause to search for marijuana. His sole articulated justification for entering the motor home was to look for "additional suspects," a justification the California Supreme Court found to be unsupported by a facutal basis. Clem never testified to any facts he knew justifying a belief there might be other "suspects" inside the living area. Petitioner does not seek review of the California Supreme Court decision that the warrantless entry by Clem was not justified as a search for additional suspects.

While Officer Williams claimed anonymous information which may have helped establish probable cause to search, there is no indication in the record the anonymout tip was communicated to Officer Clem who actually made the decision to search.

The record does not disclose whether or not Officer Clem heard the questioning of the young man. In fact, the record is devoid of evidence indicating what Officer Clem knew prior to his entry. This record does not show Officer Clem had any facts sufficient to establish probable cause for the entry.

Petitioner predicts grave difficulties in applying the California Supreme Court's rule. Whether the analysis of the Ninth Circuit and the California Court in balancing the privacy interests in living quarters against the need for effective law enforcement ultimately will prove unworkable can only be demonstrated in time through experience. Further consideration of the ramifications of the question by lower courts will enable this Court to deal with the issue more carefully if it becomes necessary. Apparently no courts other than the California Supreme Court and the Ninth Circuit have even considered the issue. As in

McCray v. New York, ____ U.S. ____, 103 S. Ct. 2438, 2439 (1983) (Stevens, J., on cert. denial) "(I)t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." Hasty decision of the question is not needed.

## CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS F. HOMANN
Attorney for Respondent
Charles R. Carney

DATED: January, 1984